

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>No. 05-CV-329-GKF(PJC)</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA’S MOTION IN LIMINE PRECLUDING  
EVIDENCE OR ARGUMENT PERTAINING TO A TMDL  
OR THE ABSENCE THEREOF**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (“State”), and respectfully moves this Court to enter an Order precluding Defendants from making any argument, doing any questioning or proffering any evidence regarding the availability of a “total maximum daily load” (TMDL) as a remedy for the pollution at issue in this case, or the absence of such a TMDL as the fault of the State or of its Attorney General’s office. In support of this Motion, the State shows the Court as follows:

**I. Introduction and Background**

This action seeks injunctive relief, penalties and damages<sup>1</sup> arising out of Defendants’ improper disposal of the hundreds of thousands of tons of poultry waste annually in the IRW. The

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<sup>1</sup> On August 3, 2009 the State filed a Motion for Reconsideration, Dkt. # 2392, of the Court’s earlier Opinion and Order, Dkt. # 2362 to the extent that Opinion and Order dismissed the State’s CERCLA claims found in Counts 1 & 2 of the SAC. As no ruling on the Motion for Reconsideration has been made as of the date of filing the present motion, out of an abundance of caution and a desire for judicial economy, the present motion addresses issues of possible jury confusion.

practice of land disposal of waste from Defendants' birds creates nonpoint source pollution, that is, pollution not originating from a pipe or other discrete point source. As a result of pollution from phosphorus, segments of the IRW is on Oklahoma's "303(d)" list<sup>2</sup> of water bodies that are not attaining water quality standards. Based upon questions posed during discovery, and certain exhibits listed by Defendants, Defendants may suggest at trial that a TMDL drafted in compliance with the Clean Water Act (CWA) is a remedy for the nonpoint source pollution that is causing injury to the waters of the IRW. It is not. As the State demonstrates below, a TMDL is a planning tool that is not self-executing. Particularly in the context of the IRW, in which much of the nonpoint source pollution originates in Arkansas, and is beyond the power of the State of Oklahoma to regulate directly, a TMDL is a planning tool that will not itself actually stop the nonpoint source pollution complained of in this case.

## **II. Argument**

### **A. A TMDL is a non-self executing planning tool that does not control nonpoint source pollution**

One United States Court of Appeals explained the role of the 303(d) list and the contrasting treatment of point sources and nonpoint sources of pollution in the CWA as follows:

CWA § 303(d) requires the states to identify and compile a list of waters for which certain "effluent limitations" "are not stringent enough" to implement the applicable water quality standards for such waters. § 303(d)(1)(A). Effluent limitations pertain only to point sources of pollution; point sources of pollution are those from a discrete conveyance, such as a pipe or tunnel. Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source.<sup>3</sup>

*Pronsolino v. Nastri*, 291 F.3d 1123, 1125-26 (9<sup>th</sup> Cir. 2002). The Act directly mandates

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<sup>2</sup> As explained below, the 303(d) list is a list of waters failing to meet water quality standards. The list is required by Section 303(d) of the CWA.

<sup>3</sup> Similarly, nutrients and bacteria from the land disposal of poultry waste in the IRW constitute nonpoint source pollution.

technological controls to limit the pollution that point sources may discharge into a body of water. *Id.*, 291 F.3d at 1126-27. These technological controls for point source pollution are established through the National Pollution Discharge Elimination System (NPDES):

An NPDES permit establishes specific limits of pollution for an individual discharger. A discharge of pollutants (other than dredged or fill material) from any “point source,” which is defined as “any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged,” 33 U.S.C. § 1362(14), into the waters of the United States is prohibited unless that discharge complies with the discharge limits and other requirements of an NPDES permit. *Id.* §§ 1311(a), 1362(12)

*City of Arcadia v. U.S. Environmental Protection Agency*, 265 F.Supp.2d 1142, 1144 (N.D. Cal. 2003). On the other hand, the CWA does not regulate nonpoint source pollution. *See American Wildlands v. Browner*, 260 F.3d 1192, 1197-98 (10th Cir. 2001) (“In the Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution. . . . [T]he Act nowhere gives the EPA the authority to regulate nonpoint source discharges”); *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) (“Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards by states”) (citation and quotations omitted).

Section 303(d) of the CWA and EPA's implementing regulations require states to identify and prioritize water bodies where technology-based effluent limitations (such as NPDES permits) and other required controls are insufficiently stringent to attain water quality standards. *City of Arcadia*, 265 F. Supp. 2d at 1144.<sup>4</sup> States must develop a “total maximum daily load,” or “TMDL,” for each pollutant of concern in each water body so identified; a TMDL represents the maximum amount of pollutant “loading” that a water body can receive from all combined sources without exceeding applicable state water quality standards. *Id.* EPA's regulations define

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<sup>4</sup> Numerous segments of the IRW and Lake Tenkiller are listed on Oklahoma's 303(d) list.

a TMDL for a pollutant as the sum of: (1) the “wasteload allocations,” which is the amount of pollutant that can be discharged to a water body from point sources, (2) the “load allocations,” which represent the amount of a pollutant in a water body attributable to nonpoint sources or natural background, and (3) a margin of safety. *Id.*

TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans. *Pronsolino*, 291 F.3d at 1129. TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing. *City of Arcadia*, 265 F. Supp. 2d at 1144.

TMDLs provide information helpful to states in adjusting point source pollution from NPDES permit holders, but offer no vehicle to control nonpoint pollution:

For point sources, limitations on pollutant loadings may be implemented through the NPDES permit system. 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA regulations require that effluent limitations in NPDES permits be “consistent with the assumptions and requirements of any available wasteload allocation” in a TMDL. *Id.* For nonpoint sources, limitations on loadings are not subject to a federal nonpoint source permitting program, and therefore any nonpoint source reductions can be enforced against those responsible for the pollution only to the extent that a state institutes such reductions as regulatory requirements pursuant to state authority.

*City of Arcadia*, 265 F. Supp. 2d at 1145.

In summary, a TMDL is a planning tool that can allow state authorities (*e.g.*, Oklahoma Department of Environmental Quality or “ODEQ”) to call for stricter standards for point source dischargers having NPDES permits. However, a TMDL would not enable the ODEQ to address phosphorus pollution from nonpoint sources, and in the IRW the largest source by far is Defendants’ land disposal of poultry waste.

Even if a TMDL for the IRW were completed today, it would only tell the ODEQ how much phosphorus must be removed from the IRW in order to meet water quality standards. It

would not magically remove that phosphorus. Nor would it bring nonpoint source pollution originating from land disposal of poultry waste in the State of Arkansas under the jurisdiction of the ODEQ. As Mark Derischweiler of the ODEQ testified, federal rules require *point sources* with NPDES permits to conform with an approved TMDL, but DEQ does not have enforcement authority over *nonpoint or unregulated point sources* in the context of a TMDL.<sup>5</sup> See Exhibit 1, Derischweiler Dep. p. 166:8-21. DEQ can required changes in permits for point sources, but has no authority to ensure that load allocations among nonpoint sources, such as in directing farmers to change land uses to reduce loading, are achieved,. Ex. 1, p. 167:9-23. The State of Oklahoma has no authority as a result of a TMDL to compel reduction in loading in Arkansas. Ex. 1, p. 288:14-19. The Defendants and the State of Arkansas agree with Mr. Derischweiler's assessment: the State of Oklahoma cannot regulate conduct in Arkansas.

A TMDL is simply not a magic bullet that can solve the nonpoint source pollution problem of the IRW. The only effective remedy is injunctive relief against Defendants for their waste disposal practices in both Arkansas and Oklahoma.

**B. The role of the Attorney General's office in advising the ODEQ, and any postponement of completion of a TMDL in the IRW is irrelevant, and comment on such would be misleading and prejudicial**

Questioning during discovery indicates Defendants may wish to present to the Court and jury a narrative whereby the Attorney General's office has delayed the completion of a TMDL for the IRW. This theory has no basis in fact, and, given the irrelevance of a TMDL to the resolution of this case, is itself especially irrelevant, misleading and prejudicial. The Attorney General's office has, from time to time, consulted with its client agency, the ODEQ, on various

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<sup>5</sup> While the State *does* have authority over nonpoint source pollution, that authority neither arises from nor is dependent upon a TMDL, which is, as demonstrated herein, a non-self-executing planning tool. The State's authority to address nonpoint source pollution is the very legal authority relied upon by the State in this lawsuit.

topics, including a TMDL for the IRW. The Attorney General's office has also provided to the ODEQ's contract TMDL modeler some of the data developed by the State's experts in this case because of concerns that Dr. Storm's model did not accurately reflect phosphorus in base flows caused by litter application in the watershed and the karst geology of the area. Ex. 1, pp. 32-33. The concern was to get the model correctly constructed to get as accurate a simulation of what was happening in the stream as possible, and the Attorney General's office's involvement was not interfering. Ex. 1, pp. 39:12-40:12. Nothing about the Attorney General's relationship with the ODEQ or the provision of expert data (also provided to the Defendants) to the ODEQ or its modeler is in any way relevant to this case.

**C. Evidence or argument about a possible TMDL for the IRW or any alleged delay in its development is not relevant to this case**

"Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Though the standard for relevance under Federal Rule of Evidence 401 is quite generous, *see United States v. Jordan*, 485 F.3d 1214, 1218 (10th Cir. 2007), proffered evidence must, at minimum, advance the inquiry of some consequential fact to be considered relevant and admissible. *See* 7 Kenneth S. Broun, *McCormick on Evidence* § 185 (6th ed. 2006)." *United States v. Oldbear*, 568 F.3d 814, 820 (10th Cir. 2009).

Moreover, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. "Relevant evidence may be excluded if it fails the

Rule 403 analysis.” *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1527 (10th Cir. 1997) (citation omitted).

The existence or non-existence of a TMDL for the IRW is not a “consequential fact” in this case. The existence or non-existence of such a non-self-executing planning tool does not make the fact of nonpoint source pollution of the waters of the IRW originating from Defendants’ waste more or less probable. Similarly irrelevant is the fact that ODEQ has not yet completed a TMDL, as is any alleged role in the supposed delay of that completion by the Attorney General’s office. These (alleged) facts do not make any fact of consequence to the determination of this action any more or less probable.

However, testimony or argument about a TMDL as a remedy for the pollution in the IRW is highly likely to confuse the issues and, particularly, mislead the jury. The false suggestion that a TMDL is a remedy for the pollution in the IRW would require correction, which would waste the time of the Court and jury. In consequence, such testimony or argument should be prohibited at trial.

### **III. Conclusion**

For the foregoing reasons, the State of Oklahoma respectfully asks the Court to prohibit any questioning, testimony, or argument pertinent to a TMDL for the IRW, or any reasons why such a TMDL has not been completed, at the trial of this case.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628  
ATTORNEY GENERAL  
Kelly H. Burch OBA #17067  
ASSISTANT ATTORNEYS GENERAL  
State of Oklahoma  
313 N.E. 21<sup>st</sup> St.  
Oklahoma City, OK 73105  
(405) 521-3921

/s/Robert A. Nance

M. David Riggs OBA #7583  
Joseph P. Lennart OBA #5371  
Richard T. Garren OBA #3253  
Sharon K. Weaver OBA #19010  
Robert A. Nance OBA #6581  
D. Sharon Gentry OBA #15641  
David P. Page OBA #6852  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS  
502 West Sixth Street  
Tulsa, OK 74119  
(918) 587-3161

Louis W. Bullock OBA #1305  
Robert M. Blakemore OBA 18656  
BULLOCK, BULLOCK & BLAKEMORE  
110 West Seventh Street Suite 707  
Tulsa OK 74119  
(918) 584-2001

Frederick C. Baker  
(admitted *pro hac vice*)  
Elizabeth C. Ward  
(admitted *pro hac vice*)  
Elizabeth Claire Xidis  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
28 Bridgeside Boulevard  
Mount Pleasant, SC 29465  
(843) 216-9280

William H. Narwold  
(admitted *pro hac vice*)  
Ingrid L. Moll  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
20 Church Street, 17<sup>th</sup> Floor  
Hartford, CT 06103  
(860) 882-1676



Jonathan D. Orent  
(admitted *pro hac vice*)  
Michael G. Rousseau  
(admitted *pro hac vice*)  
Fidelma L. Fitzpatrick  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
321 South Main Street  
Providence, RI 02940  
(401) 457-7700

Attorneys for the State of Oklahoma

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of August, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General  
Kelly H. Burch, Assistant Attorney General

fc\_docket@oag.state.ok.us  
kelly\_burch@oag.state.ok.us

M. David Riggs  
Joseph P. Lennart  
Richard T. Garren  
Sharon K. Weaver  
Robert A. Nance  
D. Sharon Gentry  
David P. Page

driggs@riggsabney.com  
jlennart@riggsabney.com  
rgarren@riggsabney.com  
sweaver@riggsabney.com  
rnance@riggsabney.com  
sgentry@riggsabney.com  
dpage@riggsabney.com

RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

Louis Werner Bullock  
Robert M. Blakemore  
BULLOCK, BULLOCK & BLAKEMORE

lbullock@bullock-blakemore.com  
bblakemore@bullock-blakemore.com

Frederick C. Baker  
Lee M. Heath  
Elizabeth C. Ward  
Elizabeth Claire Xidis  
William H. Narwold  
Ingrid L. Moll  
Jonathan D. Orent  
Michael G. Rousseau  
Fidelma L. Fitzpatrick  
MOTLEY RICE, LLC

fbaker@motleyrice.com  
lheath@motleyrice.com  
lward@motleyrice.com  
cxidis@motleyrice.com  
bnarwold@motleyrice.com  
imoll@motleyrice.com  
jorent@motleyrice.com  
mrousseau@motleyrice.com  
ffitzpatrick@motleyrice.com

**Counsel for State of Oklahoma**

Robert P. Redemann  
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

rredemann@pmrlaw.net

David C. Senger

david@cgmlawok.com

Robert E Sanders  
Edwin Stephen Williams  
YOUNG WILLIAMS P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.**

John H. Tucker  
Theresa Noble Hill  
Colin Hampton Tucker  
Kerry R. Lewis  
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com  
thill@rhodesokla.com  
ctucker@rhodesokla.com  
klewis@rhodesokla.com

Terry Wayen West  
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich  
Bruce Jones  
Krisann C. Kleibacker Lee  
Todd P. Walker  
Christopher H. Dolan  
Melissa C. Collins  
Colin C. Deihl  
Randall E. Kahnke  
FAEGRE & BENSON, LLP

dehrich@faegre.com  
bjones@faegre.com  
kklee@faegre.com  
twalker@faegre.com  
cdolan@faegre.com  
mcollins@faegre.com  
cdeihl@faegre.com  
rkahnke@faegre.com

Dara D. Mann  
MCKENNA, LONG & ALDRIDGE LLP

dmann@mckennalong.com

**Counsel for Cargill, Inc. & Cargill Turkey Production, LLC**

James Martin Graves  
Gary V Weeks  
Woody Bassett  
K. C. Dupps Tucker  
Earl Lee "Buddy" Chadick  
Vincent O. Chadick  
BASSETT LAW FIRM

jgraves@bassettlawfirm.com  
gweeks@bassettlawfirm.com  
wbassett@bassettlawfirm.com  
kctucker@bassettlawfirm.com  
bchadick@bassettlawfirm.com  
vchadick@bassettlawfirm.com

George W. Owens

gwo@owenslawfirmpc.com

Randall E. Rose  
OWENS LAW FIRM, P.C.  
**Counsel for George's Inc. & George's Farms, Inc.**

rer@owenslawfirmnpc.com

A. Scott McDaniel  
Nicole Longwell  
Philip Hixon  
Craig A. Merkes  
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com  
nlongwell@mhla-law.com  
phixon@mhla-law.com  
cmerkes@mhla-law.com

Sherry P. Bartley  
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC  
**Counsel for Peterson Farms, Inc.**

sbartley@mwsqw.com

John Elrod  
Vicki Bronson  
P. Joshua Wisley  
Bruce W. Freeman  
D. Richard Funk  
CONNER & WINTERS, LLP  
**Counsel for Simmons Foods, Inc.**

jelrod@cwlaw.com  
vbronson@cwlaw.com  
jwisley@cwlaw.com  
bfreeman@cwlaw.com  
rfunk@cwlaw.com

Stephen L. Jantzen  
Paula M. Buchwald  
Patrick M. Ryan  
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

sjantzen@ryanwhaley.com  
pbuchwald@ryanwhaley.com  
pryan@ryanwhaley.com

Mark D. Hopson  
Jay Thomas Jorgensen  
Timothy K. Webster  
Thomas C. Green  
Gordon D. Todd  
SIDLEY, AUSTIN, BROWN & WOOD LLP

mhopson@sidley.com  
jjorgensen@sidley.com  
twebster@sidley.com  
tcgreen@sidley.com  
gtodd@sidley.com

Robert W. George  
L. Bryan Burns  
Timothy T. Jones  
TYSON FOODS, INC

robert.george@tyson.com  
bryan.burns@tyson.com  
tim.jones@tyson.com

Michael R. Bond  
Erin W. Thompson  
Dustin R. Darst  
KUTAK ROCK, LLP

michael.bond@kutakrock.com  
erin.thompson@kutakrock.com  
dustin.darst@kutakrock.com

**Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.**

R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com
David Gregory Brown	
LATHROP & GAGE LC	
<b><u>Counsel for Willow Brook Foods, Inc.</u></b>	

Robin S Conrad	rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER	

Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
<b><u>Counsel for US Chamber of Commerce and American Tort Reform Association</u></b>	

D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
<b><u>Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.</u></b>	

Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	
<b><u>Counsel for Oklahoma Farm Bureau, Inc.</u></b>	

Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov
<b><u>Counsel for State of Arkansas and Arkansas National Resources Commission</u></b>	

Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
<b><u>Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen</u></b>	

Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	

James T. Banks  
Adam J. Siegel  
HOGAN & HARTSON, LLP

jtbanks@hhlaw.com  
ajsiegel@hhlaw.com

**Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation**

John D. Russell  
FELLERS, SNIDER, BLANKENSHIP, BAILEY  
& TIPPENS, PC

jrussell@fellerssnider.com

William A. Waddell, Jr.  
David E. Choate  
FRIDAY, ELDREDGE & CLARK, LLP

waddell@fec.net  
dchoate@fec.net

**Counsel for Arkansas Farm Bureau Federation**

Barry Greg Reynolds  
Jessica E. Rainey  
TITUS, HILLIS, REYNOLDS, LOVE,  
DICKMAN & MCCALMON

reynolds@titushillis.com  
jraine@titushillis.com

Nikaa Baugh Jordan  
William S. Cox, III  
LIGHTFOOT, FRANKLIN & WHITE, LLC

njordan@lightfootlaw.com  
wcox@lightfootlaw.com

**Counsel for American Farm Bureau and National Cattlemen's Beef Association**

Duane L. Berlin  
LEV & BERLIN PC

dberlin@levberlin.com

**Counsel for Council of American Survey Research Organizations & American Association for Public Opinion Research**

Also on this 5<sup>th</sup> day of August, 2009 I mailed a copy of the above and foregoing pleading to:

**Thomas C Green** -- via email: tcgreen@sidley.com  
Sidley, Austin, Brown & Wood LLP

**Cary Silverman** -- via email: csilverman@shb.com  
**Victor E Schwartz**  
Shook Hardy & Bacon LLP (Washington DC)

**Dustin McDaniel**

**Justin Allen**

Office of the Attorney General (Little Rock)

323 Center St, Ste 200

Little Rock, AR 72201-2610

**Steven B. Randall**

58185 County Rd 658

Kansas, Ok 74347

\_\_\_\_\_  
/s/Robert A. Nance